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No. 97-1320

In The

Supreme Court of the United States

October Term, 1997

BRUCE W. DAVIS, *et al.*,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. THE CITY'S ERRORS IN STATING THE CASE

1. The City claims it "immediately initiated an internal audit" once discovery revealed a one-week suspension, and "[i]mmediately upon discovery of the suspensions, . . . invoked the window . . . .". Opp. 3, 4. It fails to disclose that this "fact" was hotly *disputed*, and rebutted by documents and deposition testimony of City officials. *See* Appellants' Reply Brief, pp. 16-18, citing Record. The case was decided on summary judgment. This disputed "fact" should not have been presented here.

2. The City claims six instances of prohibited docking between 1986 and 1994. The correct number is eight, from 1986 to 1992. P.App. 82-110. The City *reimbursed six*. Docking not repaid, and those prior to 1986[1], are relevant to determine whether exempt employees were "subject to" such docking. The relevant period is *before* the City was sued in 1992. It should not get credit for refraining from docking *after* it was sued.

3. The City claims plaintiffs "were among the highest paid of all City employees . . . ". Opp. p. 3. There is no support in the Record for such a claim.

4. The City misstates the Complaint. Employees stated they were not paid for overtime hours they worked. That was sufficient. *See* Eleventh Circuit Pattern Jury Instructions (Civil Cases) (West 1990), Federal Claims Instruction 9.1; *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 394 n. 11 (1960); *Vance v. Terrazas*, 444 U.S. 252, 269 n. 11 (1980) (burden of proof not shifted if complaint

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[1] Plaintiff R.S. Davis lost wages in 1980. P.App. 113.

mentions anticipated defense); *Gomez v. Toledo*, 446 U.S. 635, 640-641 (1980) (no obligation to plead around affirmative defense). Whether they were subject to docking for prohibited reasons became an issue when the City claimed exemption.

5. The City claims no exempt employee was ever docked for a part day absence. The question is whether they were "subject to" it. Plaintiffs testified they were required to reduce leave and comp credits for such absences and their paycheck would be reduced if they did not have sufficient leave. The City admitted this was true. Appellants' Initial Br., p. 8.

II. THE CITY'S ATTEMPT TO MOOT THE ISSUE OF COSTS COMPELS EITHER VACATUR OR REVERSAL OF THE JUDGMENT

A. Cost Issue Is Not Moot. The City argues its actions render the cost issue moot. Its suggestion of mootness should be denied:

1. ***City admits the issue will surely recur, and evade review.*** The City "disputes that the award of costs in its favor was in error", and "has [simply] chosen not to pursue its cost judgments . . . ." Opp. pp. 14-15. As recently as February 9, 1998, and February 18, 1998,[2] however, the City demanded payment of the cost judgment, and threatened to "execute upon the cost judgment immediately", unless the Petition was withdrawn. Rply.App. pp. 3, 4.

An issue is not moot if it is capable of recurring, yet evading review. *See, e.g., Vitek v. Jones*, 445 U.S. 480,

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[2] The City opposed a stay of the cost judgment pending appeal. Employees were required to post a $12,000 cash bond.

486-487 (1980) (not moot unless "absolutely clear" could not reasonably be expected to recur). By continuing to insist its conduct was legal, a party basically admits the same behavior *will* recur, and the issue is not moot. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *In re Center for Auto Safety*, 793 F.2d 1346, 1351-1353 (D.C. Cir. 1986) (if public officials vigorously assert legality of conduct, correct to assume it may be resumed).

And, the City is free to dock again, use the window again after it is sued (or even after appeals), and again demand recovery of costs from employees. No court order prevents it. The City may repeal its resolution, or reinstate the old practice with impunity. *See Coral Constr. Co. v. King County*, 941 F.2d 910, 927-928 (9th Cir.), *cert. denied*, 502 U.S. 1033 (1991) ("case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision.").

2. ***Public interests and others similarly situated are affected.*** Mootness is readily rejected if the action protects broad public interests, rather than only private interests. *U.S. v. W.T. Grant*, 345 U.S. 629, 632 (1953) (because of public interest, not moot; such a powerful weapon against enforcement of public law should not be given a defendant); *Wirtz v. Local 153*, 389 U.S. 463 (1968) (not moot because need to fulfill purposes of Labor Act).

The public interest would be served by reviewing this issue on the merits. *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997), undoubtedly has a chilling effect on all employees. Moreover, misstatements by the City in court documents (Argument II.B.), give the impression the *Davis* employees were forced to pay their employer's costs when it used the window after it was sued. *See Honig v. Doe*, 484 U.S. 305 (1988) (in class

actions, plaintiff may continue to represent interests of others even after prospect of individual recovery has vanished); *Schall v. Martin*, 467 U.S. 253 n. 10 (1984) (capable of recurring if those similarly situated will be subject to the same conduct).

3. ***Court is capable of affording effective relief.*** The Court has the power to undo the untenable situation now faced by all employees, by removing the fear that they will have to pay their employer's costs, even when the employer is wrong. This will restore their statutory right to sue employers for violations. *See Church of Scientology of California v. U.S.*, 506 U.S. 9, 13 (1992) (not moot because Court could still grant effective relief, even if remedy not "fully satisfactory").

B. Even If "Moot", Procedure Is To Grant Certiorari And Vacate Because It Resulted From The City's Unilateral Action. Contrary to statements the City made under oath in documents it filed April 17, 1998, there was no "payment" by employees. The City abandoned its cost judgments. Rply.App. 1. The City argues its unilateral action moots the issue and precludes this Court's review. But, Article III "does not prescribe such paralysis." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). Instead, the Court must look to the "nature and character of the conditions which have caused the case to become moot". *U.S. v. Hamburg American Co.*, 239 U.S. 466, 477-478 (1916).

A party seeking review "ought not in fairness be forced to acquiesce in the judgment" when "mootness results from the unilateral action of the party who prevailed below". *U.S. Bancorp v. Bonner Mall*, 513 U.S. 18 (1994). Instead, vacatur is appropriate. *Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921); *Anderson v. Green*, 513 U.S.

557 (1994) (vacated since mootness not the result of voluntary action by party who lost below).

Vacatur, or reversal, is necessary to strip *Davis* of precedential value and deprive employers of this *in terrorem* tool. *See Arizonians for Official English v. Arizona*, 117 S.Ct. 34 (1996) (vacatur granted so party does not obtain a favorable judgment, then moot the dispute, and retain benefit of the judgment); *Penguin Books U.S.A., Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991) (vacatur prevents winner from "shielding erroneous decisions from reversal" while preserving preclusive effect).

III. ON THE MERITS: FLSA COSTS & ATTORNEYS' FEES

A. Employees' Request For Attorneys' Fees And Costs Not Untimely Since Impossible To Seek In Trial Court. If the City is found liable for overtime wages, employees would have an absolute right to attorneys' fees and costs under § 216(b). The City only questions whether employees may recover fees and costs for forcing it to repay wages, change policies, and promise future compliance.

The City fails to recognize the different criteria at issue. Rule 54(d)(1) permits an award of costs to a "prevailing party". In contrast, § 216(b) mandates an award of attorneys' fees and costs, not to whomever the "prevailing party" is, but to employees who receive a "judgment".

When the trial court struck down the entire pre-1992 salary basis test, it meant the City had no *legal obligation* to comply with it, and no obligation to repay money it docked prior to 1992. Accordingly, the employees were precluded from receiving a "judgment" in their favor.

Without a judgment, employees could not recover attorneys' fees and costs.

But failure to receive a "judgment" did not prevent employees from using the Rule 54(d)(1) "prevailing party" standard (asserted by the City), as a ***shield*** against paying the City's costs. Forcing the City to revise policies and promise future compliance, should have been enough to avoid reimbursing its costs. Once *Auer* held the salary basis test valid (during the *Davis* appeal), the situation changed significantly. Then, employees received wages to which they were entitled, even if they did not receive overtime wages. Then, the City was monetarily and legally liable for not complying with the test for exemption.

B. FLSA Attorneys' Fees Cases Are Relevant To FLSA Costs. The City claims the American Rule and FLSA attorneys' fees cases do not apply here. However, just as Fed.R.Civ.P. 54(d)(1) defers to any statute with its own provision for costs, the American Rule defers to any statute with a provision for attorneys' fees. Recognizing Rule 54(d)(1) defers to § 216(b), the Eleventh Circuit affirmed the award of costs to the City based upon the text of § 216(b). The weight of authority holds the text of § 216(b) precludes employers from recovering attorneys' fees from employees. This text must also preclude employers from recovering *costs* from employees.

The City also claims the intracircuit conflict on costs is irrelevant. But, "existence of an intracircuit conflict should not be ignored in preparing a petition for certiorari . . . ". Stern, Gressman, Shapiro, Geller, *Supreme Court Practice*, § 4.6, p. 176 (7th ed. 1993); *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (certiorari

granted because of intracircuit conflict and importance of the question).

C. Award Of Costs To FLSA Violators Is Palpably Wrong. *Davis'* precedent on costs has wide impact. In *Arrington v. City of Macon*, 1998 U.S. Dist. LEXIS 809, *7 (M.D. Ga. January 28, 1998), the court held employees cannot recover attorneys' fees and costs once an employer elects to use the window, because under the same circumstances, *Davis* awards costs to employers. *See also, Eugene v. McDonald's Corp.*, No. 96-2324-Civ-Highsmith, *appeal pending*, 11th Cir. No. 98-4257 (no attorneys' fees and costs to employees once employer elects the window because the window wipes away violations and prevents a judgment in employees' favor). Rply.App. 5.

IV. TO AVOID CONFLICT, THE CITY REWRITES *AUER* AND *DAVIS*

The City urges that under *Auer*, an employer loses exemption only if he had both an actual practice of improper docking, *and* a particularized policy.[3] On the contrary, *either* circumstance suffices to prove employees were "subject to" docking. Only in the "absence [of actual deductions does the Secretary] require[] a clear and particularized policy . . . ". *Auer* at 911. A practice of actually docking exempt employees rebuts any presumption that a policy was intended to apply only to non-exempt employees.

The City's denials of an actual practice of docking overtime-exempt employees, are belied by the fact that

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[3] A "particularized policy" is one effectively communicating deductions will be made in specified circumstances. *Auer*, 911.

such docking was *routinely* imposed and authorized for six straight years. Behavior that is recurring is a practice. Its denials of a policy are belied by the fact City officials interpreted their own rules to authorize such docking for any listed reason. But, nowhere does the City claim the docking that occurred here was a one-time event under unusual circumstances – the criteria specified in *Auer* for availability of the window.

The City claims *Davis* found it had no actual practice and no policy. It is unlikely such critical findings were made *sub silentio*. In the Eleventh Circuit, existence of an actual practice or policy is irrelevant if docking was for reasons other than lack of work. The *only* facts important to the *Davis* court were whether the City complied with the procedures of the window: not lack of work, repay, and promise compliance. P.App. 5. It was not at all concerned with whether the City was eligible to use it.

This is the prevailing law in this Circuit – law that conflicts with *Auer*. *See Arrington v. City of Macon*, 973 F.Supp. 1467 (N.D. Ga. 1997). Applying *Auer* and Eleventh Circuit precedent, the court concluded that as a matter of law, plaintiffs were not exempt because eleven had been docked for minor infractions over a five-year period, and they had "clearly demonstrated" a settled policy of such docking. *Id.* at 1469-70, 1473, 1475. Yet, the court held that so long as reasons were not lack of work, the employer was "clearly entitled" to the benefit of the window and could repay the money and promise future compliance, at a later time. *Id.* 1474-1475.

Regarding *Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249 (S.D. N.Y. 1997), the only reason the court thought *Davis* may not have shown a pattern and thus did not "facially" conflict with *Auer*, was its belief that there were six

instances of improper pay-docking over ***eleven years*** (from 1986 to 1997 when *Davis* was rendered). *Id.* at 257 n. 12. In fact, *Davis* had almost *triple* the frequency assumed in *Hoffman*. *See* Argument (I)(2).

The City urges week-long suspensions without pay are not a violation. It makes no sense, however, that if a minor violation occurs, the employer is prohibited from docking for less than a week, but permitted to dock for more than a week.[4] It also conflicts with the regulation. Reductions for *major* safety violations are allowed – for two days or two weeks. 29 C.F.R. § 541.118(a)(5). Reductions for *minor* violations are prohibited. Period. In addition, the salary basis test prohibits deductions for absences "occasioned by the employer". 29 C.F.R. § 541.118(a)(1). An employer who suspends an employee without pay, has "occasioned" that loss of pay.

V. CONFLICT AND VALIDITY OF WINDOW MERITS REVIEW

Conflict regarding application of the window in light of *Auer* has been acknowledged, and is growing. *Hoffman*, 982 F.Supp. 249 (S.D. N.Y. 1997); *Carbu v. Chicago Bldg. Services, Inc.*, 1998 U.S. Dist. LEXIS 969, *7-8 (N.D. Ill. Jan. 21, 1998). Quoting *Auer*, the City claims an invalidity argument must be raised with the agency first. In the same sentence, however, the Court stated, "A court may certainly be asked by parties . . . to disregard an agency

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[4] The City cites DOL opinion letters. They are not binding, not final, and are subject to withdrawal. 29 C.F.R. § 775.1; 790.17(d), (h), (i); *Taylor-Callahan-Coleman Counties v. Dole*, 948 F.2d 953, 957 (5th Cir. 1991). Nor did the City rely on them when it imposed week-long suspensions.

regulation that is contrary to the substantive requirements of the law". Only complaints of failure to rulemake, must first be brought to an agency. *Auer*, 910.

The City claims an employer's intent is relevant only to assess damages after it has been found liable. An employer that uses the window admits liability for money it docked. The City also omitted 29 U.S.C. § 259 that allows an employer to avoid liability for overtime wages only if it proves good faith compliance. Lastly, while it is true that the window has been discussed in cases, until *Auer*, it was almost always interpreted conjunctively. The DOL always interpreted its regulation that way and always required an employer prove its docking was inadvertent.

CONCLUSION

Petitioners suggest that summary reversal is now in order.

Respectfully submitted,

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Counsel for Petitioners

May 5, 1998

AFFIDAVIT OF ATTORNEY TIMOTHY J. McDERMOTT

STATE OF FLORIDA)
COUNTY OF BROWARD)
)

TIMOTHY J. McDERMOTT, being first duly sworn on oath, deposes and states as follows:

1. I am co-counsel in a pending action captioned in the Trial Court as: *Bruce Davis, et al. vs. City of Hollywood,* trial court case number 92-6993-CIV-RYSKAMP, United States District Court, Southern District of Florida (the "Action"). A Petition for Writ of Certiorari is currently pending before the United States Supreme Court in that Action. I make this Affidavit on the basis of my own personal knowledge.

2. On April 20, 1998, I received a copy of four documents served by counsel for the City of Hollywood: Two "Satisfaction of Judgments" and two "Notice of Filing Satisfaction of Judgments" which were executed by representatives of the City of Hollywood. They reference two cost judgments entered against the plaintiffs in this case in the amounts of $9,817.11 and $103.50. In those two "Satisfaction" documents, the City states, under oath, that it *"does hereby acknowledge full payment* and satisfaction thereof . . . ".

3. Those documents do not accurately state the true facts. Specifically, none of the plaintiffs in the action, nor anyone on their behalf, has ever paid any money, or provided any consideration, to the City of Hollywood in satisfaction of either of those cost judgments. In short, they were not "paid" by the plaintiffs. Moreover, neither

plaintiffs' counsel nor our clients were consulted in any regard prior to the City's unilateral decision to file those "Satisfaction" documents, nor did the City ask for, or obtain, their consent to perform the unilateral act.

4. I make this Affidavit in order to correctly reflect the true state of facts for the record. FURTHER AFFIANT SAYETH NAUGHT.

/s/ Timothy J. McDermott
TIMOTHY J. McDERMOTT

SWORN TO AND SUBSCRIBED before me this 4th day of May, 1998.

/s/ Nancy Paige Fulton
NOTARY PUBLIC
State of Florida

My Commission Expires:

[SEAL]

Nancy Paige Fulton
MY COMMISSION # CC677033
EXPIRES
September 2, 2001
BONDED THRU TROY FAIN
INSURANCE, INC.

WEISS SEROTA & HELFMAN, P.A.
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TELEPHONE (305) 854-0800
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February 9, 1998

Re: City of Hollywood adv. Davis et al.

Dear Tim:

As you know, the Eleventh Circuit has affirmed the final judgment of the trial court and denied the appellants' motion for rehearing. The motion for stay of the issuance of the mandate was denied on December 1, 1997. As a result, the costs ordered by the trial court are due and owing to the City of Hollywood. Although the mandate of the court issued more than two months ago, the costs have not been paid to the City.

Please have a check written to the City of Hollywood in the total amount of costs plus interest and forward that check to me at your earliest convenience. I believe there is also a minimal cost bill issued by the appellate court in the amount of $103.50.

If you have any questions, please feel free to give me a call.

Sincerely,

/s/ Joseph H. Serota
Joseph H. Serota

cc: Brenda Carter, Esq.
Jamie A. Cole, Esq.

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February 18, 1998

Re: City of Hollywood adv. Davis et al.

Dear Tim:

I am writing to make a formal offer of settlement with regard to this case. The City agrees to waive all costs incurred in the trial and appellate courts in exchange for your withdrawal of the petition for writ of certiorari so that it would not be necessary for the City to file a response. Since the City's response is due on March 13, 1998, I would appreciate it if you speak to your clients as soon as possible.

In addition, the City has advised me that in the event this offer of settlement is not accepted by your clients, I should move forward and execute upon the cost judgment immediately.

I know that you have numerous clients. However, please do your best to contact and advise them of this settlement offer within the next several days.

Sincerely,

/s/ Joseph H. Serota
Joseph H. Serota

cc: Brenda Carter, Esq.
Jamie A. Cole, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-2324-CIV-HIGHSMITH

MICHAEL EUGENE
on behalf of himself and
all others similarly situated,

Plaintiff,

v.

McDONALD'S CORPORATION,
a Delaware corporation,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES AND REASONABLE EXPENSES

(Filed Jan. 22, 1998)

THIS CAUSE comes before the Court upon Plaintiffs Motion for Award of Attorney's fees and Reasonable Expenses of Litigation and the documents filed in support and opposition thereto. By Order entered on April 18, 1997, this Court dismissed this action because the parties agreed that the defendant has exercised its "window of correction" under the Fair Labor Standards Act ("FLSA"). Currently, the plaintiff seeks attorney's fees under 29 U.S.C. § 216(b), asserting that he is entitled to such an award because he was a "prevailing plaintiff".

The FLSA authorizes the award of attorney's fees under certain circumstances. 29 U.S.C. § 216(b). Section 216(b) provides in pertinent part that "[t]he Court shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee be paid by the

defendant and the cost of the action." Therefore, it appears that application of this provision is limited to those instances in which judgment has been rendered in favor of the plaintiff. In the case at hand, not only has there been no judgment in favor of the plaintiff, but his complaint was dismissed with prejudice based upon the defendant's exercise of the "window of correction".

Moreover, in that Order this Court noted that, under 29 C.F.R. § 541.118(a)(6), "[h]aving properly availed itself of the 'window of correction', the defendant is to be treated, for all practical purposes, as if the alleged infraction never occurred." The Court notes that charging the defendant with the plaintiffs attorney's fees would not be treating the defendant as if no violation had occurred. Therefore, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Award of Attorney's Fees and Reasonable Expenses of Litigation (D.E. 30) is DENIED.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 22nd day of January, 1998.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Donald J. Jaret, Esq.
Curtis L. Mack, Esq.
Thomas J. Piskorski, Esq.
Jonathan Kroner, Esq.